No. 92-1618

In The

Supreme Court of the United States

October Term, 1992

THIERRY KERVYN,

Petitioner,

v.

LARRY K. DEPRIEST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STRASBURGER & PRICE

DAVID KITNER
4300 NationsBank Plaza
901 Main Street
Dallas, Texas 75202
Telephone: 214/651-4618
Facsimile: 214/651-4330

Attorney for Respondent, James S. Gilliland

FULBRIGHT & JAWORSKI L.L.P.

ROGER TOWNSEND*
ROBERT S. HARRELL
WILLIAM J. BOYCE
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713/651-5151
Facsimile: 713/651-5246

Attorneys for Respondents, Glankler, Brown, Gilliland, Chase, Robinson & Raines, Laurence D. Conn, Frank J. Glankler, Jr., Lee Chase, III, Michael A. Robinson, J.N. Raines, C. Barry Ward, John I. Houseal, Joseph Karl Wilcox, K.W. Rogers, III and O.C. Carr, III

*Counsel of Record

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STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Thierry Kervyn, a resident of Belgium, asserted claims including legal malpractice, fraud, and conspiracy in connection with his purchase of farm land near Clarksville, Texas (R. 1-4, 36-94). Kervyn sued (1) the land's seller, Deko Land & Investment Co.; (2) Larry K. DePriest, a director and officer of Deko; (3) Red River Farm Management, Inc., which managed the properties; (4) Glankler, Brown, Gilliland, Chase, Robinson & Raines, a Tennessee law firm that performed legal services in connection with the sale; and (5) the law firm's partners, Laurence D. Conn, Frank J. Glankler, Jr., Lee James Chase, III, Michael A. Robinson, J.N. Raines, C. Barry Ward, John I. Houseal, Joseph Karl Wilcox, K.W. Rogers, III, O.C. Carr, III, and James S. Gilliland (R. 1-4, 36-94).[1]

Kervyn's case languished on the district court's docket from December 1988 until March 1992. In part, this case's slow pace stemmed from Kervyn's two substitutions of counsel of record (R. 28-30, 156-170), and the need to obtain more detailed pleadings from Kervyn (R. 16-26, 31).

All defendants filed motions to dismiss Kervyn's suit with prejudice based on an April 24, 1990 deposition

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[1] Glankler, Brown, Gilliland, Chase, Robinson & Raines, Laurence D. Conn, Frank J. Glankler, Jr., Lee James Chase, III, Michael A. Robinson, J. N. Raines, C. Barry Ward, John I. Houseal, Joseph Karl Wilcox, K. W. Rogers, III, O. C. Carr, III, and James S. Gilliland will be referred to collectively as "Glankler, Brown."

during which Kervyn stipulated under oath that he wished to dismiss the case with prejudice (R. 185-204, 231-32). The United States District Court for the Eastern District of Texas, Paris Division, signed the motion to dismiss with prejudice on March 6, 1992 (R. 237-239). The order dismissing Kervyn's action was entered on March 10, 1992 (R. 237). The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal in an unpublished opinion.

Statement of Facts

Kervyn sought legal services from Glankler, Brown and partner James S. Gilliland in connection with the purchase of farm land near Clarksville, Texas in Red River County (R. 55-58). Kervyn's scattershot First Amended Complaint alleges that Glankler, Brown committed malpractice, violated the Texas Deceptive Trade Practices Act, breached fiduciary duties, and participated in making misrepresentations regarding the farm land's yields and return on investment (R. 57, 62-69, 69-74).

In April 1990, counsel for Glankler, Brown travelled at great expense to Belgium to depose Kervyn (R. 196-198). After conferring overnight with his counsel, Kervyn announced that he wanted to dismiss his case with prejudice at the beginning of the second day of the deposition:

> Q. Mr. Kervyn . . . is it true that you have made a decision that you wish to dismiss your case that has been filed here?
>
> A. Yes.

Q. And, do you understand that if you dismiss this case that it will be what American law calls "with prejudice," that is, that you will never again be able to refile this case?

A. Yes, I understand that.

Q. And, you understand that the court costs that have been spent up to this time will be your costs to be paid?

A. I can understand that.

Q. And, you understand also that at the same time that the dismissal occurs that I will withdraw from being your lawyer?

A. Yes. . . . I wish to leave now.

(R. 199-201). Kervyn then left the deposition room, never to return. In light of this dismissal, the deposition's second and third scheduled days were not completed.

Glankler, Brown filed a motion to dismiss Kervyn's case with prejudice based on Kervyn's stipulation that he wished to dismiss his case with prejudice (R. 185-186). The district court granted the motion to dismiss with prejudice on the basis of Kervyn's sworn statements (R. 237-39). In so doing the district court noted, "The statements made by the plaintiff in his deposition are clear and unequivocal. They were made under oath. Plaintiff does not now deny that he made the agreement to dismiss his suit with prejudice and left the deposition" (R. 238-39).

SUMMARY OF ARGUMENT

Kervyn's lawsuit compelled the Tennessee law firm of Glankler, Brown (R. 40) to submit to three years of litigation in Texas. At great expense, the parties travelled to Kervyn's home country, Belgium, for three days of depositions (R. 189, 198-204). Once everyone was assembled in Belgium, Kervyn made a sworn statement in response to questions by his counsel in which he voluntarily dismissed his action with prejudice (R. 198-204). Now, represented by his third attorney-of-record, Kervyn seeks to undo the effect of his stipulation and begin the process all over again. Case law and equity preclude Kervyn's belated effort to revive this wasteful litigation because the dismissal satisfies the requirements of Federal Rule of Civil Procedure 41(a)(1)(ii) as well as Texas Rule of Civil Procedure 11.

ARGUMENT

I. THE DISMISSAL WAS PROPER

Federal Rule of Civil Procedure 41(a) provides two methods for a plaintiff such as Kervyn to dismiss an action. Under Rule 41(a)(1)(ii), the plaintiff can stipulate to dismissal without a court order. Rule 41(a)(2) authorizes a district court to dismiss an action at the plaintiff's instance "upon such terms and conditions as the court deems proper." *See generally American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297-98 (5th Cir. 1963).

The federal courts refuse to elevate form over substance in considering dismissals under this rule. *See Williams v. Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976). Thus, a notice of dismissal under Rule 41(a)(1) properly may be considered a motion to dismiss under Rule 41(a)(2) if that is the appropriate vehicle under the circumstances. *See Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc.*, 474 F.2d 250, 253 (5th Cir. 1973). Moreover, the conditions attached to Rule 41(a)(1) "[do] not impose an arbitrary limitation on the court's action taken under Rule 41(a)(2)." *McGhee*, 317 F.2d at 298.

Having unequivocally stipulated that he wished to dismiss his case against Glankler, Brown (R. 199-200), Kervyn now asks this Court to revive his expensive and abusive litigation. The district court and the Fifth Circuit saw through Kervyn's gamesmanship and properly put an end to it. This Court should deny Kervyn's petition for a writ of certiorari; any other result needlessly prolongs litigation that Kervyn already has abandoned.

A. The Dismissal Satisfied Federal Rule of Civil Procedure 41(a)(1)(ii)

1. A stipulation of dismissal in open court constitutes a voluntary dismissal under Rule 41(a)(1)(ii)

When a district court takes action pursuant to Rule 41(a), "All of the concepts and processes of judicial determination are brought into play." *McGhee*, 317 F.2d at 298. As the Fifth Circuit has observed, "[C]ountless elements, traditionally called upon to underpin our concepts of reasonableness and fairness, [go] into the process of

sound discretion of the trial court. . . . " *Id.* Here, the district court clearly acted within its discretion in light of Kervyn's unequivocal statements and this litigation's history.

A stipulation in open court constitutes a dismissal under Federal Rule of Civil Procedure 41(a)(1)(ii) even when no formal stipulation of dismissal is signed by all of the parties to the action and filed with the court. *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 195 (5th Cir. 1980); *Pipeliners Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1199 (10th Cir. 1974); *Harkless v. Sweeny Indep. School Dist.*, 388 F.Supp. 738, 749 (S.D.Tex. 1975), *aff'd in part and reversed in part on other grounds*, 554 F.2d 1353, 1360 (5th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977). Kervyn's dismissal became effective when he stipulated on the record that he wished to dismiss his case against Glankler, Brown. *See Harkless*, 388 F. Supp. at 748-49.

The facts here parallel *Harkless*, in which the plaintiffs moved in open court to dismiss all claims against the individual defendants and stated they would incorporate the stipulated dismissal into their amended pretrial order. *Id.* Although the dismissal was never incorporated into the pretrial order, the *Harkless* court held that the plaintiffs' claim against the defendants was dismissed. "The 'notice' and 'stipulation' . . . approved by the Court were oral. [We prefer] a practical approach to the application of Rule 41 rather than a mechanistic one." *Id.* The court reasoned that the transcript clearly revealed the plaintiffs' intent to dismiss, an intent the defendants understood and acted upon. *Id.*

Similarly, in *Oswalt* the Fifth Circuit noted that it was not "deterred from finding a stipulated dismissal by the

fact that there is no formal stipulation of dismissal entered in the record. . . . " *Oswalt*, 616 F.2d at 195. The Fifth Circuit observed, "To require the filing of a formal document would be to countenance a mechanistic view of the Federal Rules of Civil Procedure and exalt form over substance." *Id. See also Pipeliners Local*, 503 F.2d at 1199 (upholding an explicit oral stipulation of dismissal in open court even though no document was signed).

Kervyn's deposition testimony clearly indicates he stipulated to a voluntary dismissal of Glankler, Brown with prejudice. In fact, Kervyn's statements could hardly evidence his intent to dismiss more clearly:

> Q. Mr. Kervyn . . . is it true that you have made a decision that you wish to dismiss your case that has been filed here?
>
> A. Yes.
>
> Q. And, do you understand that if you dismiss this case that it will be what American law calls "with prejudice", that is, that you will never again be able to refile this case?
>
> A. Yes, I understand that.

(R. 199).

Kervyn tacitly acknowledges his inability to distinguish *Harkless* and *Oswalt* when he fails even to cite them in his petition. Instead, he purports to rely on the Fifth Circuit's decision in *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702, 705 (5th Cir. 1966). This reliance is misplaced.

According to Kervyn, in *Transocean Air Lines* "the 5th Circuit held that Fed. R. Civ. P. 41(a)(1)(ii) 'requires that

for a dismissal by stipulation to be effective, *the stipulation must be filed* by all parties who have appeared in the cause.' " (emphasis added). Petition For a Writ of Certiorari at p. 7. Respondents note that the purported holding is quoted inaccurately; the phrase "by all parties who have appeared in the cause" nowhere appears on page 705 of *Transocean Air Lines*. In any event, the stipulation at issue in Kervyn's case was filed when all defendants filed motions to dismiss Kervyn's suit based upon his deposition testimony (R. 185-204, 231-32).

In addition, Kervyn looks for help to *United States v. MacEvoy*, 10 F.R.D. 323, 327 (D.C.N.J. 1950), and *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 609 F.2d 1335, 1337 (9th Cir. 1979). Both, however, are distinguishable. Unlike Kervyn's unequivocal statements, the stipulations at issue in *MacEvoy* and *Vuitton* did not even contain the word "dismiss."

In *MacEvoy*, the United States instituted both a civil action and a criminal action against the defendant but stipulated to have its civil action removed from the calendar subject to being reinstated by the parties' consent. *MacEvoy*, 10 F.R.D. at 325. The *MacEvoy* court refused to construe this as a stipulation of dismissal because (1) it did not contain the word "dismissal"; and (2) the stipulation's purpose was merely to hold the civil action in abeyance until the criminal action had been prosecuted to conclusion. *Id.* at 327.

Likewise, in *Vuitton* the plaintiff designer sued the defendant for trademark infringement, and the plaintiff designer and defendant stipulated to the entry of injunctive orders as a result of the plaintiff's intention to file

this action. *Vuitton,* 609 F.2d at 1336. The *Vuitton* court refused to construe the stipulation as a dismissal of the plaintiff's action because the stipulation made no mention of dismissal, and because plaintiff had prayed for monetary damages and other relief as well as for an injunction in its complaint. *Id.* at 1338.

Because it is clear that Kervyn's stipulation of dismissal was intended to dispose of the entire action, the district court acted within its discretion when it dismissed this case.

2. Kervyn's stipulation of dismissal was effectively a stipulation in open court.

Kervyn's stipulation that he wished to dismiss all claims against the defendants with prejudice was, in effect, a stipulation in open court. This follows because the parties were free to enter Kervyn's deposition into evidence at trial for any purpose. Federal Rule of Civil Procedure 32(a)(2) states:

> At the trial or upon the hearing of a motion . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition. . . . The deposition of a party . . . may be used by an adverse party for any purpose.

This rule applies irrespective of the party's availability. Fed. R. Civ. P. 32(a)(2); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 308 (5th Cir. 1978).

Given that depositions can be used in lieu of live testimony, courts have extended all rules applicable to court testimony to the deposition itself. *Naismith v. Professional Golfers Ass'n.*, 85 F.R.D. 552, 567-568 (N.D. Ga. 1979). Thus, the courts permit parties to invoke the rule during a deposition. *Williams v. Elec. Control Sys., Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975). Rule 30(c) further requires the deponent to take an oath before giving his deposition; provides that examination and cross-examination proceed as permitted at trial; and mandates the deposition be recorded stenographically unless otherwise ordered or stipulated. The ability to rely upon deposition testimony at trial has only become more important as litigants have come to rely more heavily on videotaped depositions in lieu of live testimony in an effort to reduce the length and expense of trials. Adopting Kervyn's arguments would threaten to impede the continued use and development of these time-saving techniques.

Kervyn's deposition was taken under rules applicable to courtroom testimony. Glankler, Brown was entitled to use that deposition testimony for any purpose in open court. Therefore, Kervyn's stipulation that he wished to dismiss his case was the equivalent of a stipulation in open court and constituted a voluntary dismissal under Rule 41(a)(1)(ii). *Harkless*, 388 F.Supp. at 749. *See also Oswalt*, 616 F.2d at 195 ("an oral dismissal of claims against defendants in the course of a trial was sufficient to constitute a dismissal under Rule 41(a)(1) even though there was no formal dismissal or stipulation filed with the clerk"); *Pipeliners Local*, 503 F.2d at 1199 (holding that a stipulation made in open court constitutes a voluntary

dismissal despite lack of formal agreement signed by all parties).

Kervyn cannot redraft the Federal Rules of Civil Procedure by asserting the term "open court" has its own special legal connotation requiring the parties' presence in a court room and before a judge. Kervyn has cited no federal case holding that the term "open court" requires proceedings to be held in a court room before a judge. Having failed to cite any such case, Kervyn falls back on Texas Rule of Civil Procedure 11 and tries mightily to manufacture a conflict between that rule and the disposition of this case. His effort fails.

B. The Dismissal Satisfied Texas Rule of Civil Procedure 11

Kervyn cannot conjure up a question worthy of certiorari by attempting to manufacture a conflict between Texas Rule of Civil Procedure 11 and the disposition of this case. The district court's dismissal and the Fifth Circuit's affirmance comply not only with the letter of Rule 11, but also with the case law interpreting that rule.[2]

As an initial matter, respondents note that the dismissal comports with Rule 11's bare terms. The rule states,

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[2] Respondents do not concede that Texas Rule of Civil Procedure 11 applies here. This matter focuses on the enforceability of Kervyn's unilateral decision to dismiss his lawsuit, not on an "agreement" between the parties. However, the Court need not reach this issue because nothing in Rule 11 precludes the district court's dismissal even if one assumes *arguendo* that Rule 11 applies.

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

Tex. R. Civ. P. 11. As demonstrated above, the stipulated dismissal at issue here was made "in open court" for purposes of dismissal and therefore is valid and binding upon Kervyn.

Moreover, Kervyn cannot prevail even if one assumes the stipulation was not made "in open court." The literal terms of Rule 11 do not apply in all circumstances; as the Texas Supreme Court recently observed, its holding "that Rule 11 means precisely what it says . . . should not be interpreted as requiring 'slavish adherence' to the literal language of the rule in all cases." *Kennedy v. Hyde*, 682 S.W.2d 525, 529 (Tex. 1984). On the contrary, "[A]n undisputed stipulation may be given effect despite literal noncompliance with the rule." *Id.* (citing *Thomas v. Smith*, 60 S.W.2d 514, 516 (Tex. Civ. App. – Texarkana 1933, writ dism'd).

In determining whether a particular situation warrants an exception to Rule 11, an examination of the policy behind the rule is always paramount. The Texas Supreme Court has described the policy behind Rule 11 as follows:

> The reason for Rule 11 is clear. . . . [O]ral agreements concerning suits 'are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies.'

Id. (quoting *Birdwell v. Cox*, 18 Tex. 535, 537 (1857)). Here, Kervyn does not dispute that he agreed to dismiss his case. Nor could he. The court reporter accurately transcribed Kervyn's stipulation of dismissal; there is no possibility that his oral agreement will be misconstrued or forgotten. To be sure, Kervyn changed his mind. But that change of heart in no way releases him from his stipulation after it has been made part of the record and filed in court. This is especially apparent given that the motion to dismiss (with the attached deposition excerpts) was filed many days *before* Kervyn reneged and backed away from his sworn deposition testimony.

Case law confirms this common-sense notion. In *Sone v. Braunig*, 469 S.W.2d 605, 611 (Tex. Civ. App. – Beaumont 1971, writ ref'd n.r.e.), the court held that Rule 11 is confined to negotiations made before the commencement of the actual trial at a time when the court reporter is not in attendance, or to negotiations made outside the presence of the court when a court reporter is not in attendance. Because a court reporter was in attendance at Kervyn's deposition, and accurately transcribed his statements, his Rule 11 argument must fail because the terms of the stipulation are not in dispute. *See Swartzberg v. City of Temple*, 212 S.W.2d 1016, 1017-18 (Tex. Civ. App. – Austin 1948, no writ) (validating undisputed oral agreement to postpone hearing of case until after party's return from New York); *Thomas v. Smith*, 60 S.W.2d 514, 516 (Tex. Civ. App. – Texarkana 1933, writ dism'd) (enforcing oral agreement between attorneys that abstract of title could be used as evidence).

Similarly, Kervyn cannot look for help to the Fifth Circuit's decisions in *Valley Ranch Devel. Co., Ltd. v. Federal Deposit Insurance Corp.*, 960 F.2d 550 (5th Cir. 1992), or *Anderegg v. High Standard, Inc.*, 825 F.2d 77 (5th Cir. 1987). Unlike this case, *Valley Ranch* focuses on a purported agent's ability to bind a party to a settlement agreement when that party later refuses to approve the settlement. *Valley Ranch*, 960 F.2d at 553-54. Here, there is no question of agency; the stipulation of dismissal with prejudice was elicited from Kervyn's own mouth at his deposition.

Nor does *Anderegg* provide any relief. In *Anderegg*, the Fifth Circuit held that no enforceable settlement agreement arose under Rule 11 in a situation in which plaintiffs' counsel announced a purported settlement in open court followed by the defendant's immediate denial of any such settlement. *Anderegg*, 825 F.2d at 78-79. In these circumstances, the Fifth Circuit held that no Rule 11 settlement agreement arises when "the terms are shouted at the bench by counsel for one side and immediately repudiated by the other. . . . " *Id.* In the present case, in contrast, Kervyn stated his stipulation for the record; his statements then were filed of record as part of a motion to dismiss on January 2, 1992 (R. 185-204), and became effective at that time. Kervyn did not even attempt to neutralize his stipulation until January 17, 1992 – long after it had been filed of record. Even at that point, Kervyn identified no misunderstanding or inaccuracy; he simply changed his mind after it was too late to do so (R. 210-17). Nothing in Rule 11 requires reversal under these circumstances.

Because the terms of Kervyn's stipulation are not in dispute, the documents necessary to memorialize the

stipulation are a motion to dismiss and an order of dismissal. The respondents satisfied these requirements, and the district court properly dismissed the case after respondents did so.

CONCLUSION AND PRAYER

Kervyn stipulated to a dismissal with prejudice. The only factor that has changed since Kervyn stipulated to dismissal under oath is the appearance of yet another attorney seeking to revive this action. Kervyn, who already has had more than three years to develop a case against Glankler, Brown, voluntarily abandoned his effort after putting the defendants to great expense. In light of these facts, this Court should reject Kervyn's belated effort to resurrect this case and subject Glankler, Brown to another wasteful round of litigation. Kervyn has failed to demonstrate the existence of any issue in this case worthy of a writ of certiorari from this Court.

Respondents Glankler, Brown ask this Court to deny Kervyn's petition for a writ of certiorari. Respondents

further request all other relief to which they may be entitled.

Respectfully submitted,

STRASBURGER & PRICE

DAVID KITNER
4300 NationsBank Plaza
901 Main Street
Dallas, Texas 75202
Telephone: 214/651-4618
Facsimile: 214/651-4330

Attorney for Respondent, James S. Gilliland

FULBRIGHT & JAWORSKI L.L.P.

ROGER TOWNSEND*
ROBERT S. HARRELL
WILLIAM J. BOYCE
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: 713/651-5151
Facsimile: 713/651-5246

Attorneys for Respondents, Glankler, Brown, Gilliland, Chase, Robinson & Raines, Laurence D. Conn, Frank J. Glankler, Jr., Lee Chase, III, Michael A. Robinson, J.N. Raines, C. Barry Ward, John I. Houseal, Joseph Karl Wilcox, K.W. Rogers, III and O.C. Carr, III

*Counsel of Record